No. 91-1139

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANKLIN SAVINGS ASSOCIATION and
FRANKLIN SAVINGS CORPORATION,
Petitioners.

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION
and UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AS AMICI CURIAE OF THE AMERICAN BANKERS ASSOCIATION, THE INDEPENDENT BANKERS ASSOCIATION OF AMERICA AND NATIONAL COUNCIL OF COMMUNITY BANKERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the scope of review under 12 U.S.C. section 1464(d)(2)(E), which provides for an "action" in district court to determine "upon the merits" the legality of a government seizure of a savings and loan institution, can be limited consistent with the commands of the statute and the Due Process Clause to documents designated for the record by the government, thereby precluding the district court from considering:

a) any evidence submitted by the savings and loan's representatives, even though there was no prior opportunity to submit evidence concerning the grounds for the seizure because it was *ex parte* and without notice or prior proceeding; or

b) the whole administrative record in existence at the time of the seizure.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF THE ARGUMENT	3
REASONS FOR GRANTING THE WRIT	4
The Plain Language of the Statute	4
The Due Process Clause	5
The Conflict in the Circuits	7
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
CASES:	
Angell v. Bullington, 330 U.S. 183 (1947)	5
Bell v. Hood, 327 U.S. 678 (1946)	5
Board of Governors of the Federal Reserve System v. Dimension Financial Corporation, 474 U.S. 361 (1986)	4
Brock v. Roadway Express, Inc., 481 U.S. 252 (1987)	3
Connecticut v. Doehr, 111 S. Ct. 2105 (1991)	6
Edward J. DeBartolo Corp. v. Florida Coast Building & Construction Trades Council, 485 U.S. 568 (1988)	6
Exchange National Bank v. Touche Ross & Co., 544 F.2d 1126 (2d Cir. 1976)	5
Fuentes v. Shevin, 407 U.S. 67 (1972)	6
Hooper v. California, 155 U.S. 648 (1895)	6
U.S. v. Kendrick, 853 F.2d 492 (6th Cir. 1988)	5
Mathews v. Eldridge, 424 U.S. 319 (1976)	6,7,9,10
Reardon v. United States, 947 F.2d 1509 (1st Cir., October 29, 1991) (en banc)	7,8,9
Weston Funding Corp. v. Lafayette Towers, 550 F.2d 710 (2d Cir. 1977)	5
STATUTES:	
12 U.S.C. § 1464(d)(2)(E)	4
12 U.S.C. § 1821	2
12 U.S.C. § 1823(c)(4)(A)	3
42 U.S.C. § 9613(h)	8

Table of Authorities Continued

Page

MISCELLANEOUS:

N. Barsky & K. Bacon, *FDIC Rejects Two Bids for CrossLand, Puts Up $1.2 Billion of Its Own Capital*, Wall St. J., Jan. 27, 1992, at A5. ... 2

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INTEREST OF THE AMICI CURIAE

The American Bankers Association, Independent Bankers Association of America and National Council of Community Bankers hereby respectfully submit this brief as amici curiae in support of the Petitioners with the consent of the parties. The signed consents of each are filed together with this brief.

The American Bankers Association and Independent Bankers Association are national trade associations of the commercial banking industry in the United

States. Together, they represent all but a handful of the commercial banks in the country. The National Council of Community Bankers represents approximately 350 savings institutions, some of which are directly affected by the decision in the Franklin case.

This litigation involves an interpretation and application of Section 5(d)(2)(E) of the Home Owners' Loan Act of 1933 as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, which is directed at savings associations (such as the Petitioners in this case) represented by the amicus NCCB. There is a corresponding provision of the 1989 Act, 103 Stat. at 222-24 (12 U.S.C. § 1821) directed at the commercial banks represented by the amici, ABA and IBAA. Interpretations of one of these two provisions may constitute precedent for interpretation of the other. Both statutes provide for the appointment by a federal agency of a federal agency as conservator for insured financial institutions under certain specified statutory conditions. By its very nature, a conservatorship ousts the ownership and management of the institution in question. To date, it has not been a frequently used tool with respect to the banking industry, but promises to become more so. Recent news stories surrounding the operation of CrossLand Federal Savings Bank by the Federal Deposit Insurance Corporation suggest that it is "the beginning of a new FDIC strategy for tackling problem thrifts."[1] The Chairman of the FDIC is quoted as saying that the government operation of CrossLand, rather than its liquidation, "is the least costly

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[1] N. Barsky & K. Bacon, *FDIC Rejects Two Bids for CrossLand, Puts Up $1.2 Billion of Its Own Capital,* Wall St. J., Jan. 27, 1992, at A5.

alternative to us." *Id.* FDIC is required by law to use the least costly alternative in resolving failed or failing institutions. 12 U.S.C. § 1823(c)(4)(A).

While they are heavily regulated both by federal and state authorities, commercial banks and savings institutions remain privately owned and operated businesses, just as surely as any restaurant or gas station. As private businesses, financial institutions, their managements and their owners have liberty and property interests at stake that are as deserving of constitutional protection against unchecked government action as would be the interests of any other citizens. In this case, where a federal agency is given, without exaggeration, life-and-death authority over private business, constitutional scrutiny should be at its highest. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 261 (1987). But the Tenth Circuit here has gone to the opposite extreme, leaving the business entirely to the discretion of the regulatory agency, pursuing its own agenda, and with no meaningful recourse. Member institutions of the three sponsoring trade associations have a distinct interest in protecting their own due process rights for the future.

SUMMARY OF THE ARGUMENT

The Respondent, Director of the Office of Thift Supervision, appointed a conservator for the Petitioner, Franklin Savings Association. That is an action subject to judicial review "on the merits," and such a review was sought by Franklin. The Tenth Circuit concluded that an "on the merits" review of the appointment was a review limited to such portions of an "administrative record" as the Director chose to present to the District Court. That decision is in-

consistent with the plain language of the statute; it effectively deprives the aggrieved institution of any kind of meaningful hearing, either predeprivation or postdeprivation of its property rights in violation of the due process clause of the Fifth Amendment; and it effectively sanctions a process which, in like circumstances, has been found unconstitutional in recent months by a sister Circuit. For those reasons, this Court should grant the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

It is important that this Court grant the Petition for Writ of Certiorari in order assure compliance by the lower courts with binding precedents of this Court and to reconcile the competing views of the Due Process Clause (and this Court's consistent interpretation of it) of the Tenth Circuit in this case and the First Circuit in its recent *Reardon v. United States* decision.

The Plain Language of the Statute

We begin the analysis by pointing out that the plain language of a statute is normally controlling. *See, e.g., Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. 361, 373-74 (1986). In this case, the applicable statute, 12 U.S.C. § 1464(d)(2)(E), entitles a savings association placed in conservatorship to judicial review of that action "on the merits." That term has a reasonably well understood plain meaning, developed in a variety of contexts. For example, a number of Supreme Court cases have concluded that the doctrine of res judicata generally is applicable when there has been an adjudication "on the merits," but not otherwise. The Court has found that the term is used in the sense

of the ultimate substantive issues of a litigation, *Angel v. Bullington*, 330 U.S. 183, 190 (1947), and that a court's conclusion that it lacks jurisdiction over a particular action is not an adjudication "on the merits," whereas a determination that the plaintiff had failed to state a claim upon which relief could be granted is an adjudication "on the merits." *Bell v. Hood*, 327 U.S. 678, 682 (1946). Lower courts have found that an adjudication "on the merits" had not taken place where the defendants had never been put on trial before a trier of fact. *U.S. v. Kendrick*, 853 F.2d 492, 496 (6th Cir. 1988). *See also Weston Funding Corp. v. Lafayette Towers*, 550 F.2d 710, 715 (2d Cir. 1977); *Exchange National Bank v. Touche Ross & Co.*, 544 F.2d 1126, 1130-31 (2d Cir. 1976). Here, where the Tenth Circuit limits judicial review in the District Court to the administrative record (and, indeed, to only that part of the administrative record the Director selects) and prohibits a *de novo* proceeding, it has effectively deprived the District Court of the jurisdiction and capacity to *be* a "trier of fact" or to resolve the ultimate issues of the litigation, i.e., whether in fact there was a statutory basis for the appointment of a conservator. In short, under the Tenth Circuit's construction of the law, there cannot be a decision "on the merits" in the District Court as that term is commonly understood.

The Due Process Clause

On the plain meaning of the statute alone, then, the Tenth Circuit erred and should be reversed. But the magnitude of the error is compounded by the court's failure to pay due heed to constitutional considerations. It is a given that the courts should read

statutes in such a way as to avoid a construction that would make the statute unconstitutional unless such construction is *plainly* contrary to the intent of Congress. *Edward J. DeBartolo Corp. v. Florida Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *Hooper v. California*, 155 U.S. 648, 657 (1895). If the Tenth Circuit's reading of the statute here in issue is correct, then the statute is unconstitutional under this Court's Due Process precedents.

In any due process challenge to a statute, it is critical, first, to decide if there is a deprivation of a "significant property interest." *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). In this case, that is virtually incontestable. Just last term, this Court had occasion to decide that a mere attachment lien on real property involved a significant property interest deprivation. *Connecticut v. Doehr*, 111 S. Ct. 2105, 2113 (1991). Here, the government seized the savings association entirely.

Once it is determined that a significant property interest is at stake, there is a three-part test for determining what process is due. The courts are required to consider (i) the private interest that will be affected by official action; (ii) the risk of erroneous deprivation of such interest through the procedures used and the probable value of additional safeguards; and (iii) the government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See also Connecticut v. Doehr*, 111 S. Ct at 2112.

The second of these factors is critical here. That there is a risk to Franklin here of an erroneous deprivation of its property interest should be self-evident in that the District Court found, in fact, that there

had been an erroneous deprivation. Nevertheless, the Tenth Circuit concluded that the District Judge should not have listened to the facts that led to that conclusion. That there is probable value to Franklin of safeguards in addition to the ones allowed by the Tenth Circuit is likewise self-evident, in that the District Court, having adopted those safeguards, ruled in favor of Franklin. When the Tenth Circuit concluded that those additional safeguards were not authorized by the statute, it directed the District Court to dismiss Franklin's action. If the presence or absence of particular safeguards is conclusive as to the outcome of litigation, as it clearly was here, it is hard to argue that there is no probable value to those safeguards.

The Conflict in the Circuits

This due process analysis was recently applied by the First Circuit in *Reardon v. United States*, 947 F.2d 1509 (1st Cir., October 29, 1991) (en banc), with a result directly contrary to the Tenth Circuit's decision in this case. Though *Reardon* arose under an unrelated statute, the similarities are striking, and it is clear from the respective results that the courts are in need of further guidance as to the proper application of the *Mathews v. Eldridge* analysis of due process claims.

In *Reardon*, the U.S. Environmental Protection Agency filed a lien on several parcels of real property in order to protect its rights to recover the cost of cleaning up PCB contamination of the land. The lien was filed without notice and without prior hearing. The plaintiffs, owners of the land, filed suit to have the lien set aside. They claimed that the lien was

overbroad, in that it placed restraints even on parcels of their land that were not contaminated, and that in any event they were "innocent landowners" and not responsible for the costs of cleanup. The First Circuit concluded that the governing statute, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9613(h)) deprived federal courts of the jurisdiction to consider such challenges—just as, in this case, the applicable statute as construed by the Tenth Circuit prevents the courts from entertaining the kind of full blown challenge to government action attempted by Franklin. The First Circuit went on to hold that that deprivation of an opportunity for a hearing violated the due process clause of the fifth amendment.

The court considered first the deprivation of a significant property interest, and found that the filing of a lien on the property fit the bill. Here, of course, the deprivation is much greater, in that the Office of Thrift Supervision unilaterally deprived the shareholders of their interest in Franklin entirely.

In *Reardon*, the court next considered the risk of current procedures and value of additional safeguards, comparing those cases where the issues are essentially uncomplicated and lend themselves to documentary proof, with those that are "highly factual" (*Reardon v. United States*, 947 F.2d at 1519). The court found that the issues were extremely fact-intensive, thereby demonstrating that there would be value to additional safeguards.

Here, of course, the entire thrust of Franklin's challenge is factual. The accounting practices and standards involved in the very complicated, almost unique, dealings of Franklin were the subject of an 18-day

trial in District Court, featuring highly qualified expert witnesses on both sides, taking diametrically opposed views of the issues (*See* Pet. App. at 19a). The *Reardon* court concluded that, in such a fact-intensive case, due process requires a meaningful hearing; the Tenth Circuit in this case concluded that the District Court should not have bothered to hear expert witnesses and judge their credibility, but rather that due process required only a review of selected portions of the Director's administrative record.

The First Circuit then weighed the government's interest in the balance, including "exigent circumstances" and the "fiscal and administrative burdens that the additional or substitute procedural requirement would entail," and found those factors less than compelling. In this case, as in *Reardon*, a real post-deprivation hearing would not in any way impede the fundamental governmental purpose. In *Reardon*, any liability for cleanup costs could be imposed upon subsequent owners, so there would have been no loss to the EPA from an inability or a delayed ability to file a lien during ownership by the plaintiffs. Here, the conservatorship placed Franklin in the hands of the Office of Thrift Supervision until such time as a court determined (if it did) that the conservatorship was improper.

CONCLUSION

This Court has held that the due process clause of the Fifth Amendment requires that persons deprived or to be deprived of a significant property interest must be afforded a meaningful opportunity to be heard on the matter at a meaningful time. *Mathews v. Eldridge*, 424 U.S. at 335. The Tenth Circuit's decision

deprives the Petitioner of that right, while a contemporaneous decision by the First Circuit, in a case less compelling than this one, affords that basic right. This Court should grant the Petition for Writ of Certiorari in order to harmonize the application of the *Mathews* test among the Circuits.

Respectfully submitted,

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OPPOSITION

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v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals correctly held that there was no justification for going beyond the administrative record in reviewing the decision of the Director of the Office of Thrift Supervision to appoint a conservator for petitioner Franklin Savings Association.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Camp v. *Pitts*, 411 U.S. 138 (1973)	6, 12
Cannon v. *University of Chicago*, 441 U.S. 677 (1979)	11
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971)	6
Collie v. *FHLBB*, 642 F. Supp. 1147 (N.D. Ill. 1986)	10
Fidelity Savings & Loan Ass'n v. *FHLBB*, 540 F. Supp. 1374 (N.D. Cal.), rev'd, 689 F.2d 803 (9th Cir. 1982)	9
Gibralter Savings v. *Ryan*, 772 F. Supp. 1290 (D.D.C. 1991).	10
Guaranty Savings & Loan Ass'n v. *FHLBB*, 794 F.2d 1339 (8th Cir. 1986)	9, 10
Haralson v. *FHLBB*, 721 F. Supp. 1344 (D.D.C. 1989)	10
Lincoln Savings & Loan Ass'n v. *Wall*, 743 F. Supp. 901 (D.D.C. 1990)	10
Marietta Franklin Sec. Co. v. *Muldoon*, 770 F. Supp. 1212 (S.D. Ohio 1991), appeal pending, No. 91-3930	10
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	
Telegraph Savings & Loan Ass'n v. *FSLIC*, 564 F. Supp. 862 (N.D. Ill. 1981), aff'd, 703 F.2d 1019 (7th Cir. 1983)	9-10
United States v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963)	6, 11
Washington Federal Savings & Loan Ass'n v. *FHLBB*, 526 F. Supp. 343 (N.D. Ohio 1981)	10
Woods v. *FHLBB*, 826 F.2d 1400 (5th Cir. 1987)	9, 10

Statute and regulations: Page

FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236:
§ 133(d), 105 Stat. 2271 4
§ 133(g), 105 Stat. 2273 4
Financial Institutions Reform, Recovery and Enforcement Act, Pub. L. No. 101-73, 103 Stat. 183:
Section 301, 103 Stat. 277 (12 U.S.C. 1462a (Supp. I 1989)) 2
Section 401, 103 Stat. 354 (12 U.S.C. 1437 note (Supp. I 1989) 2
5 U.S.C. 706(2)(A) 7
12 U.S.C. 1437 (Supp. I 1989) 2
12 U.S.C. 1462a (Supp. I 1989) 2
12 U.S.C. 1462(d)(2)(C) (Supp. I 1989) 4, 5, 6, 8
12 U.S.C. 1462(d)(2)(E) (Supp. I 1989) 9, 10, 13

Miscellaneous:

Hearings on S. 3158 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 89th Cong., 2d Sess. (1966) 11
H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1 (1989) 3

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 934 F.2d 1127. The decision of the district court (Pet. App 44a-116a) is reported at 742 F. Supp. 1089.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1991. A petition for rehearing was denied on September 10, 1991. Pet. App. 42a-43a. On November 27, 1991, Justice White extended the time for filing a petition for a writ of certiorari to January 8, 1992, and

the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 15, 1990, the Director of the Office of Thrift Supervision (the "Director" of "OTS") appointed the Resolution Trust Corporation as conservator for petitioner Franklin Savings Association ("Franklin Savings"), a financially distressed, federally insured thrift institution.[1] Petitioners, Franklin Savings and its parent corporation, challenged the Director's action. The district court ordered the Director to remove the conservator, but the court of appeals vacated that order.

1. Prior to 1981, Franklin Savings was a traditional federally insured savings association that relied on deposits by individuals and businesses to make single family mortgage loans. In 1981, Franklin Savings adopted what it called "innovative operating strategies" and "nontraditional pursuits." Over the next eight years, Franklin Savings' assets grew from $200 million to more than $11 billion. In the early stages of this growth, Franklin Savings invested in underpriced mortgage-backed securities (MBS), which entitle the holder to a share in the payments from a fixed pool of mortgage loans. By the mid-1980s, Franklin was pursuing its investment objectives with higher-risk and more volatile MBS derivatives, which entitle the holder to only part of the mortgage payment (*e.g.*, "principal only") and have a thin secondary market. By June 30,

[1] Congress established the Office of Thrift Supervision in 1989 and gave it responsibility for the examination, supervision, and regulation of all federally insured savings associations. OTS replaced the Federal Home Loan Bank Board. See Financial Institutions Reform, Recovery and Enforcement Act, Pub. L. No. 101-73, §§ 301, 401, 103 Stat. 277, 354; 12 U.S.C. 1462a, 1437 (Supp. I 1989).

1989, the stated value of Franklin's MBS derivatives and "junk bonds" was $3.6 billion, or 35% of its total asset base. Pet. App. 3a-4a, Trial Exh. 2001 (Exh. 6, at 4).

Franklin Savings also turned from local depositors to nationally solicited brokered deposits, which present two problems. First, brokered deposits are costly because they carry a higher than normal interest rate and require the payment of a commission. Second, brokered deposits are short term, consisting of what is known as "hot money," and can severely strain an institution's liquidity since it must continuously find cash to pay depositors as their certificates mature. Congress has condemned reliance on brokered deposits as indicative of "poor management." H.R. Rep. No. 54 101st Cong., 1st Sess. Pt. 1, at 299 (1989). By December 31, 1989, Franklin Savings' brokered deposits had increased to $3.3 billion, or 70.7% of its total deposits. Pet. App. 4a, 26a.

Franklin Savings lost more than $58 million during the 15-month period ending on December 31, 1989. Moreover, the Director determined that Franklin Savings was facing losses of more than $300 million. Franklin Savings had nevertheless paid its eight executive officers $3.5 million ($1.8 million in bonuses) and had paid dividends of approximately $15 million during 1988 and 1989. Pet. App. 5a. The court of appeals concluded that "[a] review of the administrative file clearly reveals a high-flying, debt-laden troubled savings and loan," in which the owners were "diverting millions of dollars into their pockets through large salaries, bonuses and dividends, notwithstanding the losses being incurred by the association." *Id.* at 40a.

These problems came to light as a result of the disclosures made by Franklin Savings in the Form 10-K that it filed with the Securities and Exchange

Commission and the Federal Home Loan Bank Board on June 30, 1989, and the Director's October 1989 examination of Franklin Savings. Petitioners were well aware of the Director's concerns: during the course of the 1989 examination "there had been numerous meetings, telephone calls, and correspondence between Director and Franklin relating to the numerous problems found by Director," and the Director "also issued specific directives to Franklin to deal with these concerns but Franklin was either unable or unwilling to comply with the directives." Pet. App. 7a.

When Franklin Savings failed to satisfy the Director's concerns, he appointed a conservator on February 15, 1990. Pet. App. 8a. The statutory basis for the Director's action was 12 U.S.C. 1464(d)(2)(E)(Supp. I 1989),[2] which provided that "[i]f, in the opinion of the Director, a ground for the appointment of a conservator * * * exists, the Director is authorized to appoint ex parte and without notice a conservator." More specifically, the appointment of the conservator was based on three of the grounds set forth in former 12 U.S.C. 1464(d)(2)(C)(Supp. I 1989): the Director found that (1) Franklin Savings was in an unsafe and unsound condition to transact business; (2) Franklin Savings had or was likely to incur losses that would deplete all or substantially all of its capital and there was no reasonable prospect for its capital to be replenished without federal assistance; and (3) there was a violation or violations of laws or regulations or an unsafe and unsound condition which was likely to cause insolvency or substantial dissipation of assets and earnings, or was

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[2] Section 1464(d)(2)(E) was redesignated Section 1464(d)(2)(B) in 1991, effective December 1992. FDIC Improvement Act of 1991, Pub. L. No. 102-242, § 133 (d) and (g), 105 Stat. 2271, 2273. Like the court of appeals and petitioners, see Pet. 2 n.1, we will refer to the provision as Section 1464(d)(2)(E).

likely to weaken Franklin Savings' condition. Pet. App. 7a.

2. Petitioners challenged the appointment of the conservator pursuant to Section 1464(d)(2)(E), which provided that "[i]n the event of such appointment, the association may, within 30 days thereafter, bring an action in the United States district court * * * for an order requiring the Director to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Director to remove such conservator or receiver." The Director accordingly filed with the United States District Court for the District of Kansas the three-volume administrative record containing all materials that were before him when he made his decision, and certified this record to be complete and correct.

The district court, however, decided to "consider evidence outside the administrative record." Pet. App. 51a. In fact, the district court held an 18-day trial at which it "heard live testimony from twenty-five witnesses; accepted deposition testimony from eighteen witnesses; [and] received over 650 trial exhibits." *Id.* at 19a, 44a. The district court, which said that it was applying a "hybrid standard of review," acknowledged that the statute "does not provide for *de novo* review, but for review on whether the agency's action was based on statutory grounds or was arbitrary and capricious or an abuse of discretion." *Id.* at 51a-52a. However, after reviewing all of the evidence the district court "engaged in credibility determinations regarding competing experts [and] basically made its own findings, compared those to the findings of Director, and decided the conservator was wrongly appointed." *Id.* at 19a.

3. The court of appeals vacated the district court's judgment and remanded with instructions to dismiss

the action. Pet. App. 41a. With respect to the scope of review under Section 1464(d)(2)(E), the court concluded that in most instances review should be confined to the administrative record. Pet. App. 12a. In reaching that conclusion, the court noted that the statute, "while clearly authorizing judicial review of the director's decision, fails to specifically define the scope of that review." *Id.* at 11a. "In cases where Congress has provided for judicial review without setting forth the standards to be used or procedures to be followed in conducting that review," the court continued, this Court has advised that "such review shall be confined to the administrative record and, in most instances, no de novo proceedings may be had." *Id.* at 12a, citing, among other cases, *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 419-420 (1971); and *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963) (footnote omitted).

In this case, the court of appeals concluded, it made sense to follow the normal approach. The statute "establishes that the determination of whether the statutory grounds to appoint a conservator exist lies in the province of the *director's opinion.*" Pet. App. 11a-12a. In addition, Congress did not mandate specific procedures, but instead directed the Director to rely on his opinion, because "it expects the director to be vigilant and responsive"; quick action may be needed because "[i]f there is inadequate capital to absorb losses, the losses fall upon the FDIC, and if these funds are depleted, then upon taxpayers." *Id.* at 12a. The court of appeals concluded that "[t]he close supervision, broad discretion, and quick response directed by [the statute] dictate[] a narrow and limited scope of review that gives deference to the director's judgement, knowledge, and expertise." *Ibid.*

At the same time, the court of appeals stressed that it is appropriate to go outside the administrative record in some cases. The court said that it would be appropriate for a reviewing court to consider additional evidence in three sorts of cases: (1) "[w]here the administrative record fails to disclose the factors considered by the agency"; (2) "where necessary for background information or for determining whether the agency considered all relevant factors including evidence contrary to the agency's position"; and (3) "where necessary to explain technical terms or complex subject matter." Pet. App. 13a. But no such circumstances were presented here. To the contrary, the court of appeals concluded that the Director made "formal findings and produced and certified a voluminous and detailed agency record for review that would enable the reviewing court to conduct a substantial and meaningful review from the agency record." *Id.* at 15a.

The court of appeals specifically addressed and rejected petitioners' claim that its views were not adequately presented by the administrative record. "In making these assertions," the court said, "Franklin ignores the substance of the agency record, which contains numerous recitations of Franklin's views and reasons therefor." Pet. App. 17a. The court also concluded that "[t]he record shows [that] Franklin had numerous opportunities to present its views and that those views were considered by Director." *Ibid.*

Turning from the scope of review to the standard of review, the court of appeals held that the district court had "articulated the standard of judicial review correctly" by stating that the decision to appoint a conservator was to be set aside only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Pet. App. 22a, quoting 5 U.S.C. 706(2)(A). However, the court of appeals concluded that

the district court's "actions in applying this standard resulted in error as it in fact applied a de novo review." Pet. App. 22a. After reviewing the Director's decision under the proper standard, the court of appeals concluded that the decision to appoint a conservator "was supported by substantial evidence and is in accordance with the applicable law." *Id.* at 41a.

ARGUMENT

Petitioners agree that review "under §1464(d)(2)(E) proceeds under the familiar arbitrary and capricious *standard* of review." Pet. 19. However, they argue that the district court properly expanded the *scope* of review beyond the administrative record by hearing from 25 witnesses, accepting 18 depositions, and receiving more than 650 exhibits. Pet. 15-24. Alternatively, petitioners argue that the administrative record should not be limited to the materials that the Director actually relied upon in making his decision to appoint a conservator, but should be expanded to include every document in the agency's files that directly or indirectly relates to the decision. Pet. 24-28. There is no warrant for review of those contentions since all three of the courts of appeals to have considered the issue have correctly agreed that the normal rule governing the scope of review of an administrative decision—review confined to the designated administrative record—applies under Section 1464(d)(2)(E) and the court of appeals specifically held that there was no need to go beyond the record in this case.[3]

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[3] In addition, the question presented does not affect nearly as many cases as petitioners suggest. See Pet. 3, 28-30. From February 1989 through December 11, 1991, OTS and its predecessor appointed conservators or receivers for 675 institutions, but only 21 of those decisions have been challenged in court. Of those challenges only seven, including this case, remain pending. The most recent public report of the Director stated that on September

1. The other courts of appeals to have considered the appropriate scope of review under Section 1464(d)(2)(E) have both concluded, like the court below, that review is normally limited to the administrative record. In *Guaranty Savings & Loan Ass'n* v. *FHLBB*, 794 F.2d 1339, 1342 (8th Cir. 1986), the court held "that the district court correctly restricted its review to the administrative record." In *Woods* v. *FHLBB*, 826 F.2d 1400, 1408 (5th Cir. 1987), the court similarly concluded "that Congress did not intend for the district court to review the Bank Board's decision *de novo*, but rather that the decision be reviewed on the basis of the administrative record." Both courts noted that in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963), this Court reiterated that "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceedings may be held." 826 F.2d at 1406; 794 F.2d at 1342.[4]

30, 1991, there were only 79 savings associations that OTS thought were likely to be placed in conservatorship or receivership in the foreseeable future. That number is in contrast to the 377 savings associations that were in this category on December 31, 1989. Dir., OTS Press Conference (Dec. 10, 1991).

[4] Petitioners contend, despite this agreement in the courts of appeals, that "[c]onsiderable confusion exists among district courts." Pet. 15. Of course, review by this Court generally is not warranted on account of disagreements among district courts. In any event, petitioners exaggerate the extent of that disagreement. The decision in *Fidelity Savings & Loan Ass'n* v. *FHLBB*, 540 F. Supp. 1374 (N.D. Cal.), was reversed by the court of appeals, which did not reach the scope of review issue. *Fidelity Savings & Loan Ass'n* v. *FHLBB*, 689 F.2d 803 (9th Cir. 1982). Although the district court's decision in *Telegraph Savings & Loan Ass'n* v. *FSLIC*, 564 F. Supp. 862 (N.D. Ill. 1981), was affirmed, the court of appeals

Like the court below, the Fifth and Eighth Circuits correctly rejected the primary argument petitioners advance in support of their claim that a district court should conduct de novo proceedings, which is that de novo review is required by the statute's direction that "the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver." The Eighth Circuit explained in *Guaranty Savings* that "the 'upon the merits' language * * * merely means that the district court's decision to either dismiss the action or remove the appointed receiver should be based upon the merits of the action (i.e., whether statutory grounds for a receivership exist) rather than on procedural or policy oriented grounds." 794 F.2d at 1342. The Fifth Circuit and the court below both agreed with that conclusion. 826 F.2d at 1406; Pet. App. 14a.[5] The unanimous conclusion of the three courts

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did so on different grounds. 703 F.2d 1019 (7th Cir. 1983). In *Haralson* v. *FHLBB*, 721 F. Supp. 1344 (D.D.C. 1989), *Collie* v. *FHLBB*, 642 F. Supp. 1147 (N.D. Ill. 1986), *Washington Federal Savings & Loan Ass'n* v. *FHLBB*, 526 F. Supp. 343 (N.D. Ohio 1981), and *Lincoln Savings & Loan Ass'n* v. *Wall*, 743 F. Supp. 901 (D.D.C. 1990), the district courts ruled for the Director's predecessors and there was no appeal. In *Marietta Franklin Sec. Co.* v. *Muldoon*, 770 F. Supp. 1212 (S.D. Ohio 1991), appeal pending, No. 91-3930 (filed Sept. 22, 1991), the district court ruled for OTS and the plaintiff has appealed. And in *Gibralter Savings* v. *Ryan*, 772 F. Supp. 1290, 1293 (D.D.C. 1991), the district court with national jurisdiction over challenges to the appointment of conservators and receivers, 12 U.S.C. 1464(d)(2)(E)(Supp. I 1989), recently was "persuaded by the reasoning in *Franklin Savings*, *Woods*, and *Guaranty Savings* that the scope of review must be limited to the administrative record that was before the Director at the time the decision was made to appoint a receiver."

[5] The Eighth Circuit's decision in *Guaranty Savings* and the Fifth Circuit's decision in *Woods* were both issued prior to Congress's reenactment of Section 1464, including the phrase "upon the merits," in 1989. Since it is "appropriate to assume that

of appeals that have considered the issue is plainly correct. Nothing about the phrase "upon the merits" relates to the scope of review; an affirmance or a reversal upon the merits could be based either on an administrative record or on a de novo proceeding. But Congress's direction that the courts act "upon the merits" precludes the district courts, for example, from removing a conservator as a remedy for a procedural defect.[6]

Petitioners contend that Congress would have said that review is to be "on the record" if it meant to restrict the scope of review to the administrative record. Pet. 18. But that overlooks the general rule that "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceedings may be held." *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963); see also Pet. App. 12a, 826 F.2d at 1406, 794 F.2d at 1342.

Moreover, in a case like this, involving informal adjudication, it is entirely appropriate for a reviewing court

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our elected representatives * * * know the law," *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979), it is appropriate to assume that Congress was aware of those decisions and agreed with them.

[6] Petitioners suggest that de novo review is called for because until 1966 an administrative hearing was required prior to the appointment of a conservator. Pet. 24 n.19. But in 1966 Congress declined to enact a proposal that would have authorized a reviewing court to "conduct a trial of the facts and the law in the case *de novo* and where appropriate upon the merits dismiss such action or direct the Board to remove such conservator or receiver." *Hearings on S. 3158 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 324 (1966).

to go beyond the administrative record in certain limited circumstances, as the court of appeals recognized. Pet. App. 13a. Thus, where the factors considered by the agency are not apparent from the record; where the record does not disclose whether the agency considered evidence contrary to its position; and where more information is needed so that the district court can understand technical or complex subject matter, it is permissible to go beyond the record. *Ibid.* That may also explain why Congress provided for review in the district courts: where there is no administrative record resulting from a formal adjudication, some factfinding may be required in order to determine whether the agency acted arbitrarily or capriciously. But that is no warrant for a full-blown trial like the one the district court held in this case. Cf. *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court").

Petitioners miss the mark in arguing, Pet. 23, that de novo review does not jeopardize the goals Congress sought to further through the statutes governing the savings and loan industry. While it is theoretically possible that a reviewing court could hold an 18-day trial, hear 25 live witnesses, review 18 depositions and more than 650 documents, and then review the agency's decision under the arbitrary and capricious standard, it is not surprising that after conducting such an extensive proceeding the district court "basically made its own findings [and] compared those to the findings of Director." Pet. App. 19a. As a result, the ultimate responsibility for determining whether a conservator should be appointed was transferred from the Director to the district court. But Congress vested "the responsibility for determining the quality of assets, the proper

levels and types of assets and liabilities, appropriate accounting standards, and the numerous other questions relating to the safe and sound condition of a financial institution" in the Director. *Id.* at 40a. The district court improperly substituted its judgment for that of the Director in these matters for which Congress has assigned responsibilities to the Director. The court of appeals has, on proper analysis, corrected the trial court's error.

2. As a fall-back, petitioners contend that even if a full-blown trial is not mandated by Section 1464(d)(2)(E), due process required the district court in this case to go beyond the administrative record designated by the Director because, they claim, the Director excluded documents supporting their position from the designated record. There is no dispute on the legal point raised by petitioners. The court of appeals acknowledged that a reviewing court could go beyond the administrative record in certain circumstances, specifically including "where necessary for background information or for determining whether the agency considered all relevant factors including evidence contrary to the agency's position." Pet. App. 13a. We agree.

But the court of appeals correctly concluded in this case that petitioners had ample opportunity to be heard and that the designated administrative record was adequate. "The record shows Franklin had numerous opportunities to present its views and that those views were considered by Director." Pet. App. 17a. The designated record "contained voluminous data" that reflected the extensive submissions Franklin Savings made to OTS. *Ibid.*[7] Accordingly, the court of appeals

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[7] Moreover, the court of appeals recognized that Franklin was not seeking an evidentiary hearing to dispute the accuracy of the data on which the Director relied, but to contest "basic policy decisions, such as whether the degree of Franklin's reliance upon

correctly concluded that petitioners had a full opportunity to present their positions during the examination and that the administrative record reflected their positions.

Finally, the court of appeals specifically rejected petitioners' claim that "the agency record is one-sided." Pet. App. 17a. And it made that determination against the backdrop of the 18-day trial conducted by the district court, where petitioners were able to introduce all of the evidence they claimed had been improperly excluded from the administrative record. In short, there is no warrant for review by this Court of petitioners' factbound claim that the administrative record was inadequate in this case.

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brokered deposits constitutes an unsafe or unsound practice," and the Director's predictive judgments concerning expected losses and depletion of capital. Pet. App. 18a, 33a. Due process does not require a trial de novo of such issues. "The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." *Mathews* v. *Eldridge*, 424 U.S. 319, 348 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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